Supreme Court, U. S.
FILED
MAR 21 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

NO. 76-1308

RICARDO WOODS

and

ROLAND REAVES,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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For the reasons set forth above, Certiorari should be granted.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Ohio entered in the above entitled cause on December 1, 1976, imposing upon Petitioners a sentence of death in the electric chair, which is repugnant to and violative of the Eighth Amendment of the Constitution of the United States.

OPINION BELOW

The Opinion of the Supreme Court of Ohio is reported at 48 Ohio St. 2d 127, 357 N.E. 2d 1059, and printed herein

as Appendix A. The Order of the Supreme Court of Ohio denying rehearing, issued December 22, 1976, is printed herein as Appendix B. The Order of the Supreme Court of Ohio Staying Execution of Sentence is printed herein as Appendix C. The Opinion of the Court of Appeals for the First Appellate District of Ohio, Hamilton County, is unreported and is printed herein as Appendix D. The verdict of the jury, Hamilton County Court of Common Pleas, is printed herein as Appendix E, and the Judgment of the Hamilton County Court of Common Pleas appears only as the original dockets and records of that Court. The Indictment alleging the criminal offense of Aggravated Murder, which instituted the Criminal Process, is printed herein as Appendix F.

JURISDICTION

The judgment of the Hamilton County, Ohio, Court of Common Pleas, was entered against Petitioner Woods on October 23, 1974, and against Petitioner Reaves on October 24, 1974, convicting each of Aggravated Murder, in violation of Revised Code of Ohio, Section 2903.01. The Court of Appeals for the First Appellate District of Ohio, Hamilton County, affirmed the conviction of Petitioner Woods on January 26, 1976, and the conviction of Petitioner Reaves on January 26, 1976, holding that the Ohio Death Penalty Scheme is not unconstitutional.

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1257 and 2101 and Part V of the Rules of this Court.

QUESTIONS PRESENTED

The constitutional questions to be presented by this Writ of Certiorari were presented to the Hamilton County Court of Common Pleas by written pre-trial motions to

dismiss, which issues were preserved at each appropriate stage, during Appellate Review and before the Supreme Court of Ohio, and those questions are:

I. Whether Ohio's statutory framework for the imposition of Capital Punishment (Revised Code, Sections 2929.03 and 2929.04) is constitutional and does not impose cruel and unusual punishment within the meaning of the Eighth Amendment of the United States Constitution.

II. Whether Ohio's Death-Sentence Scheme is unconstitutional considering the illusory nature of some of the specified mitigating factors, the narrow scope of what remains and the irrelevance of non-specified factors.

III. Whether Ohio's system of denying a jury to and requiring a Defendant to prove by a preponderance of the evidence that he should not be executed violates due Process of Law under the Constitution of the United States.

IV. Whether Ohio's absence of a system of Appellate Review of all death sentences, which includes a comparison of case by case facts to insure that a death sentence in a particular case is warranted, is violative of the Eighth Amendment of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Eighth Amendment of the Constitution of the United States and Sections 2939.03 and 2929.04 Revised Code of Ohio, are set forth in Appendix G herein.

STATEMENT OF THE CASE

On July 17, 1974, at approximately 12:40 a.m. o'clock, on-duty uniformed Cincinnati Police Officer, David Cole, then operating a marked police vehicle, responded to a location known as 2373 Florence Avenue, Cincinnati, Ohio, pursuant to a Police Radio Transmission, to investigate a man on the roof of a business premises. At 2316 Florence Avenue, Patrolman Cole encountered Petitioners. A volley of gunfire was heard by other arriving officers and Patrolman Cole was subsequently found, in the street area, mortally wounded by both .38 and .22 caliber projectiles. The Hamilton County, Ohio, Grand Jury, on July 19, 1974, returned its Indictment against Petitioners, charging them with Aggravated Murder with Specifications of Aggravation. Pre-Trial Motions to dismiss on the grounds of death penalty statute unconstitutionality were filed, argued and denied. Severance for trial was ordered, and the jury impaneled to try Petitioner Reaves returned its guilty as charged verdict on October 24, 1974. Petitioner Woods, electing to be tried by a three (3) judge Court, was adjudged guilty as charged on October 23, 1974. Pre-Sentence investigation and report and psychiatric examinations were ordered and following a finding in each case of no mitigating circumstances, Petitioners were sentenced to death in the electric chair.

The Court of Appeals for the First Appellate District of Ohio, Hamilton County, affirmed the lower Court by decision in each case, rejecting Petitioners claim that the Ohio Death Penalty Scheme is repugnant to the Constitution (Appendix D).

On December 1, 1976, the Supreme Court of Ohio entered its Opinion, concluding, as it had held on November 24, 1976, in that cause entitled *State* v. *Bayless*, reported in 48 Ohio St. 2d 73, 357 N.E. 2d 1035, that Ohio statutory framework for the imposition of Capital Punishment is constitutional and does not impose cruel and unusual punishment within the meaning of the Eighth Amendment of the Constitution of the United States (Appendix A).

REASONS FOR GRANTING WRIT

This case involves grave and substantial constitutional issues concerning the power of the State to determine who is and who is not eligible for death. The Ohio Legislative attempt to define and describe who shall be chosen to die and who shall live falls far short of this Court's announced guidelines, and fails to satisfy and overcome constitutional objections. Ohio law is now born of the concept that two steps in the dark toward death are better than one, for the three (3) statutory, mitigating factors are illustory in nature, so narrow in scope as to be practically meaningless and place upon the Defendant the burden of proving by a preponderance of the evidence one, more or all of such factors if he is to escape execution. Petitioners are the victims of man's failure, inability or unwillingness to treat all men equally, for the Ohio Death Penalty Scheme has opened the flood gates of arbitrariness, authorizes and condones unguided and unrestricted discretion and contains no provision for a review which includes a comparison on a case by case basis of facts to insure that an imposed death sentence is warranted and justified.

I

Whether Ohio's statutory framework for the imposition of Capital Punishment (Revised Code Sections 2929.03 and 2929.04) is constitutional and does not impose cruel and unusual punishment within the meaning of the Eighth Amendment of the United States Constitution.

The rigid, regressive and harsh features of the Ohio Death Penalty Statutes are equal to those found constitutionally defective in *Woodson* v. *North Carolina,* 96 S.Ct. 2978, and *Roberts* v. *Louisiana,* 96 S.Ct. 3001. These statutes do not permit particularized consideration of the relevant aspects of the character and record of each convicted Defendant required by this Court. Rather, they concentrate upon and limit attention to certain aspects of just the alleged criminal conduct for resolution of the live or die decision. Ohio Defendants are now sentenced to die by a process of arbitrary selection that does not differ in any constitutionally significant respect from the selection-election process in vogue immediately prior to *Furman* v. *Georgia,* 408 U.S. 238. The Ohio Supreme Court disposed of Petitioner Reaves with a two (2) paragraph opinion, a total of sixteen and one-quarter (16¼) lines, just one hundred and thirty five (135) words. No consideration is given to nor mention made of the how or why Petitioner Reaves differed significantly or otherwise with any other condemned Defendant. Contemporary standards of decency dictate that loss of life deserves far more than what was accorded or awarded to Roland Reaves. The highest standards of accuracy and reliability are now required to insure that execution is the proper punishment in the cause under consideration. The Ohio Statutes permit and tolerate inaccuracies and allow unreliabilities as are hereinafter demonstrated.

II

Whether Ohio's Death-Sentence Scheme is unconstitutional considering the illusory nature of some of the specified mitigating factors, the narrow scope of what remains and the irrelevance of non-specified factors.

Revised Code of Ohio, Section 2929.04 (B) sets forth three (3) mitigating circumstances:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

The first mitigating circumstance probably is limited to the mercy killing, for without a willing victim no consideration could ever be given to this circumstance. This is mitigation in name only, a legislative daydream, which first conjures up that mercy killer convicted of aggravated murder with specification and then finds him in that ghost-like position of proving he should not die because he killed out of mercy – his victim induced and facilitated his own death

The second mitigating circumstance is in two (2) parts:

a. That the offender had at the time of crime commission a psychosis or mental deficiency.

b. That the offense was *primarily* a product of this condition.

Psychosis and mental deficiency are clearly included in mental disease or defect, which reach and cover exculpation, not mitigation. In *State* v. *Staten,* 18 Ohio St. 2d 13, the Ohio Supreme Court announced its current rule:

> "One accused of criminal conduct is not responsible for such criminal conduct if, at the time of such conduct as a result of mental disease or defect, he does not have the capacity either to know the wrongfulness of his conduct or to conform his conduct to the requirements of the law."

Psychosis or mental deficiency is not, in and of itself, insanity in Ohio, but is such a part thereof that this mitigating circumstance cannot be distinguished from excuse for and avoidance of criminal responsibility.

Conviction of capital murder with specification where the defense is insanity which, of course, demands that the crime was primarily a product of the accused's mental condition, leaves no room for asserting mental condition as a mitigating factor because there is just no substantial difference between the Ohio definition of insanity and the psychosis or mental deficiency contained in this mitigating circumstance. Where a trial jury rejects the insanity defense, such verdict realistically rejects the mitigating circumstance. If the insanity evidence does not raise a reasonable doubt, it also fairly deprives the Defendant of any right to assert that the act was primarily the product of his psychosis or mental deficiency.

The final mitigating circumstance provides that if proved by the accused by a preponderance of the evidence, he was under duress, coercion or strong provocation without which it is unlikely that the offense would not have been committed, he shall be spared. Classic interpretation of duress and coercion is declared by the Ohio Supreme

Court in its opinion which ignored the available psychiatric evidence concerning Petitioner Woods, his absence of law enforcement and Court contact, his domination by and leading from others. While conceding that Petitioner Reaves was the "gun-wielding tough", the Ohio Court states, probably as a matter of law, that failure to take advantage of an opportunity to abandon or refrain from criminal action removes any claim of duress or coercion. This attitude and approach begs the obvious, for it is unlikely or impossible that those easily influenced, led, dominated or inherently weak will or could ever break from the strong and flee. The required pre-sentence, probation report concerning each Petitioner was not before, available to nor ever considered by the Ohio Supreme Court. All the Court reviewed and determined was that there was substantial evidence to support and justify the sentence of death as to each Petitioner. It cannot be denied that glaring, obvious differences exist in the sentence issues posed in the separate cases of Petitioner Reaves and Petitioner Woods. Thusly, this mitigating circumstance is so narrow, so confined and so restricted that it is valueless, worthless and a practical waste of time to pursue it.

III

Whether Ohio's system of denying a jury to and requiring a Defendant to prove by a preponderance of the evidence that he should not be executed violates due process of law under the Constitution of the United States.

The Ohio Court (Opinion, page 135) places upon the Defendant the burden of proving by a preponderance of the evidence, one or more of the mitigating circumstances to either the Trial Judge, if a jury trial was had, or to a three (3) Judge panel, where a jury was waived, before he can escape death. This proof standard and burden, so fixed, runs contrary to this Court's holdings in *In Re Winship*, 397 U.S. 358, and *Mullaney* v. *Wilbur*, 421 U.S. 684, each of which sought to improve the reliability of the fact determining process when major interests were at stake. Under Ohio's burden of proof requirement, a Defendant can be executed when the evidence indicates that it is as likely as not that he deserves to spend his life span confined. The rationale of *Winship* and *Mullaney* are, thusly, fully applicable to the Ohio system. The interest of all Defendants is transcendent, life itself, a far greater interest than what was involved in either *Winship* or *Mullaney*. Although the stigma of execution means nothing to the one executed, there can be no greater stigma for those who survive. By contrast, the State's interest is inconsequential. No question of erroneous exoneration is involved, for a conviction will result in a life sentence in any event. That the State, therefore, has an additional proof burden in a capital case and must prove a negative is of no consequence, as this Court so ruled in *Mullaney* (id. at 702). The failure to place upon the prosecution the obligation of proving beyond a reasonable doubt the absence of any mitigating circumstance before a death

sentence can be imposed, renders the Ohio Scheme unconstitutional.

The exclusion of a jury's vote from the sentencing process deprives a Defendant of the right to have society itself voice its feelings concerning his acts. Juries were designed to make findings of the kind set forth in Ohio's three (3) mitigating circumstances, which are factual determinations not basic to guilt or innocence, but revolving about the degree and severity of criminal culpability. *Mullaney* v. *Wilbur*, 421 U.S. 684, holds that where the determination of certain factors is of crucial importance where it "may be of greater importance than the difference between guilt or innocence for many lesser crimes", the State may not lessen the standards by which those factors must be proved by "characterizing them as factors that bear solely on the extent of punishment". The difference between death and a life sentence is just about as crucially significant as anything in human experience, and as noted in *United States* v. *Kramer*, 289 Fed. 2d 909, where an aggravating circumstance is not

> "an element of the crime but rather a fact going only to the degree of punishment"

and where the presence of the aggravating circumstance substantially increases the severity of possible sentencing consequences, it must be assumed that

> "the Sixth Amendment entitles a Defendant to have that fact determined by the jury rather than by the sentencing Judge".

The Kramer principle is just as valid and forceful in the case of mitigating factors which are critical to sentence.

IV

Whether Ohio's absence of a system of Appellate Review of all death sentences, which includes an actual and complete comparison of case by case facts to insure that a death sentence in a particular case is warranted, is violative of the Eighth Amendment of the United States Constitution.

In *Proffitt* v. *Florida,* 96 S.Ct. 2967, the facts reflected that the Florida Supreme Court had set aside the death sentence in 40% of the cases it considered (pp. 2969-70), and to date, the Ohio Supreme Court has affirmed seventeen (17) of eighteen (18) death sentences, reversing one conviction only for evidentiary error unrelated to sentence. As far as Petitioners can ascertain, Ohio has not compared any one death case with any other death cases, and has announced no rule or procedure for obtaining information about cases in which the Trial Judge found that mitigating circumstances existed and the death penalty was not imposed. In the first death penalty case to reach the Ohio Supreme Court, *State* v. *Bayless,* 48 Ohio St. 2d 73, 357 N.E. 2d 1035, the Court held that it possesses the authority to review death sentences and, while probably it does, the issue now is whether or not the Ohio Court has ever reviewed adequately a death sentence by comparing it with any other death sentence to insure that it is proportionate to the sentence imposed in the similar case. Petitioners can find nothing to indicate that adequate sentence comparison exists in Ohio. Assurance against disproportionality is required in *Jurek* v. *Texas,* 96 S.Ct. 2950, which also demands consideration of not only the detailed facts of each case, but the life and character of the offender and how he may or does differ from other convicted capital murderers. In Ohio,

one convicted of aggravated murder and sentenced to death does become a member "of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death". *Woodson* v. *North Carolina,* 96 S.Ct. 2978. If he dies, he does so without constitutional approval.

CONCLUSION

For the reasons herein contained, certiorari should be granted.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF OHIO

THE STATE OF OHIO,

Appellee,

v.

WOODS,

Appellant.

THE STATE OF OHIO,

Appellee,

v.

REAVES,

Appellant.

[Cite as State v. Woods (1976), 48 Ohio St 2d 127.]

Criminal law – Aggravated murder – Imposition of death penalty – Constitutionality – Specifications – R.C. 2923.02 (A) – "Criminal attempt" proved, when – Mitigation of death sentence – R.C. 2929.04 (B), construed – Duress or coercion established, how.

1. A "criminal attempt" is when one purposely does or omits to do anything which is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime. To constitute a substantial step, the conduct must be strongly corroborative of the actor's criminal purpose. (R. C. 2923.02[A] construed.)

2. Within the meaning of the standard for mitigation of the death sentence for aggravated murder in R. C. 2929.04 (B), duress or coercion may be established by proof that force, threat of force, strong persuasion or domination by another, necessitous circumstances, or some combination of these, has overcome the mind or volition of the defendant so that he acted other than he ordinarily would have acted in the absence of those influences.

(Nos. 76-137 and 76-155—Decided December 1, 1976.)

APPEALS from the Court of Appeals for Hamilton County.

Shortly after midnight on July 17, 1974, the Cincinnati police received a telephone call from a woman who said that she had seen a man of the roof of the United Dairy Farmers store at 2373 Florence Avenue in Cincinnati. That information was broadcast to patrol cars in the area and several officers responded. One of the officers, Patrolman Terry Kramer, observed two men looking over their shoulders while walking on Florence Avenue in the vicinity of the store, and he reported that information over the police radio. Another officer, Patrolman David Cole, also responded to the broadcast and was approaching the scene along Florence Avenue.

Just after he made his broadcast, Patrolman Kramer heard a series of gunshots. Other officers also heard the shots and came to the scene. Patrolman Cole was lying in the street at the rear of his cruiser, dying from multiple gunshot wounds. Cole was pronounced dead on arrival at the hospital, and the subsequent autopsy and ballistics examination disclosed that he had been shot by both a .22 and a .38 caliber weapon.

Ronald Reaves, the defendant in case No. 76-155, was arrested on July 18, 1974, in Cincinnati and subsequently made statements to investigating officers which implicated Ricardo Woods, the defendant in case No. 76-137. Woods was arrested on July 19, 1974, in West Virginia at the home of his mother. After the arrival of Cincinnati police, Woods made a complete statement as to his part in the events leading up to and following the homicide.

Both defendants were charged with multiple counts of aggravated murder with specifications. Reaves was tried before a jury, and Woods before a three-judge panel. The evidence presented at the two trials was virtually identical. It established that Woods had been living with Reaves' sister for some time and had recently been laid off from his construction job. Woods and Reaves met for the first time, about two weeks before the killing, when Reaves came to Cincinnati from Chicago. Woods state that on July 16, he and Reaves agreed that they needed money, and, using Woods' unemployment check as funds, Reaves negotiated the purchase of a .38 caliber revolver, which Reaves told the seller he planned to use to rob a loan company. Later, around midnight, Reaves, accompanied by Woods, parked his car close to the United Dairy Farmers store, and both men began to "case" the store. According to Woods' statement, they could see the store manager inside. The plan was to wait until the manager came out and to "hold him up and take the money." Reaves had the .38 caliber revolver and Woods had a .22 caliber pistol which Reaves had brought from Chicago. Reaves then left Woods as a lookout across the street, and climbed onto the roof of the store.

Reaves descended from the roof and joined Woods who said that "things looked funny." Apparently, they had heard the sirens of a fire department unit making a run

nearby. Woods and Reaves were walking away from the store and down Florence Avenue when Patrolman Cole skidded to a stop near the curb. Woods stated that he leaned in the front passenger window of the police cruiser to talk to Cole just as the officer was getting out on the opposite side of the car, and that when Cole got to the rear of the cruiser, Reaves began to fire at him, the first bullet striking Cole in the chest. Reaves fired three or four times, and Woods also shot at Cole, who at that time was lying on the street, as he and Reaves fleld the scene. Cole fired four shots without hitting the fleeing men.

The pair ran to the house of a friend nearby, changed clothes, and drove away in the friend's car. Woods left the next morning for his mother's home in West Virginia.

At their separate trials, Reaves and Woods were each found guilty of aggravated murder, under a count in the indictment charging that they had purposely caused the death of Patrolman Cole while fleeing immediately after attempting to commit aggravated robbery, and guilty of the second specification, that at the time of the offense the victim was a law-enforcement officer whom they knew to be such, and who at the time was engaged in his duties. Following mitigation hearings, both defendants were sentenced to death. The Court of Appeals affirmed both judgments in separate opinions, and the causes are now before this court as a matter of right.

Mr. Simon L. Leis, Jr., prosecuting attorney, *Mr. Fred J. Cartolano, Mr. Robert R. Hastings, Jr.*, and *Mr. Merlyn Shiverdecker*, for appellee.

Mr. Jack C. Rubenstein and *Mr. Harry H. McIllwain*, for appellant Woods.

Messrs. Gilday, Jung & Gilday, Mr. Bernard J. Gilday, Jr., and Mr. D. Shannon Smith, for appellant Reaves.

I

STERN, J. In case No. 76-155, appellant Reaves raises three propositions of law. Two of these assert that Ohio's constitutional scheme for imposition of the death penalty is unconstitutional. That issue was decided by this court in *State* v. *Bayless* (1976), 48 Ohio St. 2d 73, and need not be reconsidered here. Those propositions of law are overruled.

Appellant also claims error in the prosecution's inquiry upon *voir dire* into veniremen's opposition to capital punishment. Three prospective jurors were excused because of their opinions on capital punishment, and the record shows that each answered definitely that he could not join in a guilty verdict if the result was that the defendant might be sentenced to death. This court finds that no error was committed in excusing them as persons "otherwise unsuitable for any other cause to serve as a juror." Crim. R. 24 (B) (14); *State* v. *Bayless, supra.*

II

In case No. 76-137, appellant Woods raises similar claims relating to the constitutionality of Ohio's death penalty statutes and also contends that the evidence was insufficient to prove an attempted robbery, or, in the alternative, that the defense had proved an abandonment of the offense, and that the charge of aggravated murder against Woods should accordingly have been reduced to murder.

There is no serious dispute concerning the facts of this case. Defendants Reaves and Woods decided to rob the manager of the United Dairy Farmers store by accosting him as he came out with the day's receipts; they "cased" the premises; Reaves climbed onto the roof, while Woods

stayed behind as a lookout; Reaves then climbed back down, apparently having heard the nearby fire engine siren; and Reaves and Woods then walked away, leaving Reaves' car behind.

R.C. 2923.02 (A) provides that: "No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct which, if successful, would constitute or result in the offense."

The committee comment for this section states, in part, that: "In order to prove an attempt to commit an offense, it must be shown that particular conduct directed toward commission of the offense took place and that such conduct, if successful, would constitute or result in the offense. • • •" This language establishes that the essential elements of a criminal attempt are the *mens rea* of purpose or knowledge, and conduct directed toward the commission of an offense. The statute does not, however, indicate how far this conduct must proceed toward the actual consummation of the crime in order to be considered an attempt to commit that crime. There is also little case law in Ohio on this question, although this court has held that the conduct necessary for a criminal attempt "need not be the last proximate act prior to the consummation of the felony." *State* v. *Farmer* (1951), 156 Ohio St. 214, 216, 102 N. E. 2d 11; *Fox* v. *State* (1878), 34 Ohio St. 377. In *Farmer*, an assault with intent to rob was held, at page 217, "sufficient to justify the triers of the facts in determining beyond a reasonable doubt that the action of the defendant at the time of • • • [an] altercation was action taken to carry out that intent and therefore amounted to an attempt to perpetrate robbery." In this case, Reaves committed no assault, and the question arises as to whether his acts nevertheless amounted to an attempt to rob.

American courts have generally agreed that intent to commit a crime does not of itself constitute an attempt, nor does mere preparation. The difficulty is to formulate a standard that excludes preparations prior to an actual attempt to commit a crime, while including, as punishable, those acts which are so dangerously close to resulting in a crime that intervention and arrest by the police are justified, even before the "last proximate act." Various tests have been suggested and followed in other jurisdictions. There is a good discussion of this problem and the various approaches in Wechsler, Jones and Korn, The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy. 61 Columbia L. Rev. 571, 573-621. It is not necessary to consider each of the alternative approaches here. Ohio's statutory definitions of criminal offenses is the Revised Code are based largely upon the American Law Institute's Model Penal Code, and the standard adopted in the latter Code appears to us workable, reasonable, and consistent with the language of R.C. 2923.02 (A). Under Section 5.01 of the Model Penal Code, an attempt is when one "purposely does or omits to do anything which is • • • an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." To constitute a "substantial step," the conduct must be "strongly corroborative of the actor's criminal purpose." The application of this standard will of course depend upon both the nature of the intended crime and the facts of the particular case. A substantial step in the commission of a robbery may be quite different from that in arson, rape, or some other crime. But this standard does properly direct attention to overt acts of the defendant which convincingly demonstrate a firm purpose to commit a crime, while allowing police intervention, based upon ob-

servation of such incriminating conduct, in order to prevent the crime when the criminal intent becomes apparent.

Reaves' act of climbing onto the store roof with a gun, apparently to lie in wait for the store manager, was plainly a substantial step in the planned robbery, and certainly was strongly corroborative of the criminal purpose. We find no error in the trial court's holding that this conduct could constitute attempted robbery, or in the verdict of the three-judge panel that the defendant Woods was guilty beyond a reasonable doubt.

There was also sufficient evidence from which to conclude that the defendants had not "completely and voluntarily" renounced their criminal purpose. Abandoning an attempt out of fear that the police might be coming cannot reasonably be considered voluntary. Nor is it clear in this case that the attempt was completely abandoned, for the defendants left the car parked near the store and walked away, behavior from which a jury might properly infer that they intended only to wait at a distance and observe whether the robbery might still be possible despite the siren they had heard.[1] We find no error in the guilty verdict rendered by the three-judge panel.

III

At the mitigation hearing held following appellant Woods' conviction, the defense argued that his sentence

[1] Cf., Model Penal Code, Section 501(4):

"• • • Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim."

should be reduced to life imprisonment because it was "unlikely that the offense would have been committed, but for the fact that the offender was under duress [or] coercion • • •," R. C. 2929.04 (B) (2). The evidence presented at the trial and the mitigation hearing indicated that Reaves had been the dominant party in initiating, planning, and carrying out the crime. There was also evidence that Reaves had been involved in criminal gang activities in Chicago. According to Woods' testimony, Reaves bragged of his criminal past and owned a sawed-off shotgun with "initials" cut in the stock for men he had killed. Woods did not claim that he was actually threatened by Reaves, but did assert that he was intimidated by him, wished to back out of the planned robbery, and went along with it unwillingly only after Reaves placed the gun in his hands and told him that all he had to do was stay on the sidewalk and watch for the police. Woods testified that he was reluctant to stay, but that he was afraid of what Reaves might do because of his violent reputation, and that when they were walking away he was only going to talk to the policeman, but that Reaves pushed Woods back and started shooting. Woods said that he had shot at the policeman because he was scared. The examining psychiatrist testified that Woods had no prior record and had been an outstanding athlete in high school. The psychiatrist testified further that Woods was a person "dependent on other people's opinion and leadership," that he "would not offer much objection to being dominated or controlled," and that he probably would not have committed the crime if he had not been under duress, coercion, or strong provocation. Woods' parents also testified on his behalf.[2]

[2] One difficulty in considering the claims for mitigation in this case is that the pre-sentence report required to be made by statute does not appear in the record. This court bears a special responsibility

The question is whether this evidence was sufficient to justify mitigation of sentence. R. C. 2929.04 (B) provides that the death penalty:

"• • • is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance [*sic*] of the evidence:

"• • •

"2. It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation."

This language must be strictly construed against the state and liberally construed in favor of the accused. R. C. 2901.04 (A).

In construing and applying the words "duress" and "coercion," we must note first that those terms would be a virtual nullity if they were taken to apply to the legal standard for duress as a defense to a criminal charge.

In the case of the most common type of aggravated murder, purposely causing death in connection with certain felonies, if the defendant has a valid defense of duress to the underlying crime, he can, at most, be convicted of the murder itself, not of aggravated murder, and he would not then be subject to the death penalty.[3] Accordingly, to have

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in capital cases to assure that the ultimate penalty of death be imposed fairly and consistently, and that responsibility requires that we independently evaluate the evidence of aggravation and mitigation upon which each death sentence is based. For that reason, pre-sentence reports and other information relevant to the appropriateness of the death sentence should properly be included in the record of each case brought to this court as a matter of right because the appellant's sentence of death has been affirmed by the Court of Appeals.

[3] There is strong precedent for holding that duress is not a defense to murder, but that question has not been decided in Ohio. At common law, no person can excuse himself for taking the life of an innocent person on the grounds of duress. *Arp* v. *State* (1893), 97 Ala. 5, 12 So. 301; *Watson* v. *State* (1951), 212 Miss. 788, 55 So. 2d 441; *State* v. *Weston* (1923), 109 Ore. 19, 219 P. 180; *State* v. *Nargashian* (1904), 26 R. I. 299, 58 A. 953; *Leach* v. *State* (1897), 99 Tenn. 584, 42 S. W. 195. This rule has been modified by statute in some states. *Jones* v. *State* (1950), 207 Ga. 379, 62 S. E. 2d 187; *Paris* v. *State* (1895), 35 Tex. Crim. 82, 31 S. W. 855.

any effective meaning, the terms "duress" and "coercion" in R. C. 2929.04 (B) must be construed, if possible, more broadly than when used as a defense in criminal cases. This is particularly true since the defendant is required to establish duress or coercion by a preponderance of the evidence for purposes of mitigation, whereas during trial he is required only to present evidence sufficient to raise such an affirmative defense, and the burden of disproving it beyond a reasonable doubt remains with the prosecution. *State* v. *Robinson* (1976), 47 Ohio St. 2d 103, 351 N. E. 2d 88.

The concepts of duress and coercion are also found in civil law and have broader meaning. The application of those concepts varies greatly, and turns largely upon the circumstances of each individual case, including the character of the one sought to be influenced. As this court held in *Tallmadge* v. *Robinson* (1952), 158 Ohio St. 333, 109 N. E. 2d 496, paragraph two of the syllabus:

"In determining whether a course of conduct results in duress, the question is not what effect such conduct would have upon an ordinary man but rather the effect upon the particular person toward whom such conduct is directed, and in determining such effect the age, sex, health and mental condition of the person affected, the relationship of the parties and all the surrounding circumstances may be considered."

Duress usually connotes some degree of force or threat of force, but duress has also been found when the conduct of one person induces another to enter into a contract against

his own volition or judgment, generally out of fear, but also in some cases because of extreme persuasion or pressure of circumstances. 13 Williston on Contracts (3 Ed.), Section 1608. Coercion is generally defined more broadly to include undue influence and other lesser forms of compulsion. It has been said that:

"The words 'coercion' and 'duress' are not synonymous, although their meanings often shade into one another. 'Duress' generally carries the idea of compulsion, either by means of actual physical force or threatened physical force applied to the person (or to some near relative of the person) to be influenced, or applied to the property or reputation of such person. 'Coercion' may include a compulsion brought about by moral force or in some other manner with or without physical force." *McKenzie-Hague Co.* v. *Carbide & Carbon Chemicals Corp.* (C. A. 8, 1934), 73 F. 2d 78, 82. Coercion has been found in a wife's refusal to return to her husband and resume marital relations (*Campbell* v. *Prater* [1948], 64 Wyo. 293, 191 P. 2d 160), and in an employer's warning to striking workers that if they did not return to work by a certain day their jobs would be filled (*N. L. R. B.* v. *Montgomery Ward & Co.* [C. A. 9, 1943], 133 F. 2d 676).

These judicial definitions of coercion correspond to the common use of the word. Webster's Third New International Dictionary defines coercion as "the act of coercing: use of physical or moral force to compel to act or assent," and to coerce as "to restrain, control or dominate, nullifying individual will or desire (as by force, power, violence, or intimidation)."

The essential characteristic of coercion which emerges from these definitions is that force, threat of force, strong persuasion or domination by another, necessitous circumstances, or some combination of those, has overcome the

mind or volition of the defendant so that he acted other than he ordinarily would have acted in the absence of those influences.

This definition appropriately allows consideration of the broad range of information relevant to mitigation set out in R. C. 2929.04, including "the nature and circumstances of the offense and the history, character, and condition of the offender." It also corresponds, as well perhaps as any definition, to the essential purpose of any hearing upon mitigation. The question at that stage is not guilt, for guilt has already been determined. Nor is it primarily whether the standards of conduct imposed by the criminal law have been upheld in order to express society's disapproval of the criminal act and to deter others, for those goals too are largely accomplished by the verdict. Rather, the purpose of mitigation is to recognize that the punishment assigned for a criminal act may, for ethical and humanitarian reasons, be tempered out of consideration of the individual offender and his crime. As the United States Supreme Court has said: "• • • The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions • • •." *Williams* v. *New York* (1949), 337 U. S. 241, 247.

Construing R. C. 2929.04 (B) liberally in favor of the accused, we think that the standard stated is appropriate for the trial judge or judges to apply to the facts presented at the mitigation hearing, including the nature and circumstances of the offense and the history, character and condition of the defendant, in making the determination of whether a sentence of death should be reduced to life imprisonment because of duress or coercion.

In the present case, the evidence establishes a consistent portrait of Woods as a young man with no previous criminal record but one who was easily led and who came under the influence of Reaves, the brother of the woman he was living with. It appears likely that it was the influence of Reaves which persuaded Woods to agree to participate in a robbery, to acquiesce and cooperate in the purchase of the gun, and to remain at the scene of the attempted robbery despite his reluctance. All of these are factors which favor the granting of mitigation. Yet the hard fact remains that when the opportunity to abandon the robbery, to surrender to the police, to flee, or even to refrain from firing, was presented, Woods nevertheless opened fire on the wounded officer, despite the fact that Woods was not ordered or even urged to do so. In committing that act, for which punishment under law must now be set, defendant Woods was under neither coercion nor duress, and we can accordingly find no grounds for reducing the sentence of death imposed upon him.

IV

The judgments of the Court of Appeals in 76-155, *State* v. *Reaves*, and 76-137, *State* v. *Woods*, are affirmed.

Judgments affirmed.

O'NEILL, C. J., HERBERT, CORRIGAN, CELEBREZZE, W. BROWN and P. BROWN, JJ., concur.

APPENDIX B

THE SUPREME COURT OF THE STATE OF OHIO

1976 TERM

To wit: December 1, 1976

No. 76-137

THE STATE OF OHIO,)
)
City of Columbus.)

THE STATE OF OHIO,

Appellee,

vs.

RICARDO WOODS,

Appellant.

MANDATE

To the Honorable COMMON PLEAS COURT

Within and for the County of HAMILTON. Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion rendered herein. It is further ordered that the execution date be set for Monday, January 31, 1977.

THOMAS L. STARTZMAN,
Clerk

• • •

RECORD OF COSTS

Docket Fee ..... $ ..... Paid by Affidavit of Poverty

• • •

THE SUPREME COURT OF THE
STATE OF OHIO

1976 TERM

To wit: December 22, 1976

No. 76-137

THE STATE OF OHIO,)
)
City of Columbus.)

THE STATE OF OHIO,
Appellee,

vs.

RICARDO WOODS,
Appellant.

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to with, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 22nd day of December, 1976.

THOMAS L. STARTZMAN, Clerk.

• • •

THE SUPREME COURT OF THE
STATE OF OHIO

1976 TERM

To wit: December 1, 1976

No. 76-155

THE STATE OF OHIO,)
)
City of Columbus.)

THE STATE OF OHIO,

Appellee,

vs.

RONALD A. REAVES,

Appellant.

MANDATE

To the Honorable COMMON PLEAS COURT

Within and for the County of HAMILTON, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion rendered herein. It is further

ordered that the execution date be set for Tuesday, February 1, 1977.

THOMAS L. STARTZMAN,
Clerk

• • •

RECORD OF COSTS

Docket Fee ..... $..... Paid by Affidavit of Poverty

• • •

THE SUPREME COURT OF THE
STATE OF OHIO

1976 TERM

To wit: December 22, 1976

No. 76-155

THE STATE OF OHIO,)
)
City of Columbus.)

THE STATE OF OHIO,

Appellee,

vs.

RONALD A. REAVES,

Appellant.

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 22nd day of December, 1976.

THOMAS L. STARTZMAN, Clerk.

• • •

APPENDIX C

THE SUPREME COURT OF THE
STATE OF OHIO

1976 TERM

To wit: December 29, 1976

No. 76-137

THE STATE OF OHIO,)
)
City of Columbus.)

STATE OF OHIO,

Appellee,

vs.

RICARDO WOODS,

Appellant.

ENTRY
(HAMILTON COUNTY)

Upon consideration of the motion, filed by counsel for appellant, to stay execution of sentence pending the timely filing of an appeal to the Supreme Court of the United States, it is therefore

ORDERED that execution of sentence be, and the same hereby is, stayed, pending the timely filing of an appeal to the Supreme Court of the United States.

It is further ORDERED that if a timely notice of appeal is filed to the Supreme Court of the United States, this stay will automatically continue pending final determination of the appeal by that Court.

It is further ORDERED that the Clerk of this Court shall forthwith send a certified copy of this Stay of Execution to the Superintendent of the Southern Ohio Correctional Facility, who shall acknowledge receipt thereof.

/s/ C. WILLIAM O'NEILL
CHIEF JUSTICE

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 29th day of December, 1976.

THOMAS L. STARTZMAN, Clerk.
By /s/ SAM F. JENKINS, Deputy.

THE SUPREME COURT OF THE STATE OF OHIO

1976 TERM

To wit: December 29, 1976

No. 76-155

THE STATE OF OHIO,)
)
City of Columbus,)

THE STATE OF OHIO,
Appellee,
vs.
ROLAND A. REAVES,
Appellant.

ENTRY
(HAMILTON COUNTY)

Upon consideration of the motion, filed by counsel for appellant, to stay execution of sentence pending the timely filing of an appeal to the Supreme Court of the United States, it is therefore

ORDERED that execution of sentence be, and the same hereby is, stayed pending the timely filing of an appeal to the Supreme Court of the United States.

It is further ORDERED that if a timely notice of appeal is filed to the Supreme Court of the United States,

this stay will automatically continue pending final determination of the appeal by that Court.

It is further ORDERED that the Clerk of this Court shall forthwith send a certified copy of this Stay of Execution to the Superintendent of the Southern Ohio Correctional Facility, who shall acknowledge receipt thereof.

/s/ C. WILLIAM O'NEILL
CHIEF JUSTICE

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 29th day of December, 1976.

THOMAS L. STARTZMAN, Clerk.
By /s/ SAM F. JENKINS, Deputy.

APPENDIX D

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-75047

STATE OF OHIO,
Plaintiff-Appellee,
vs.
RICARDO WOODS,
Defendant-Appellant.

OPINION
(Filed January 26, 1976)

**Appeal From The Court of Common Pleas
Hamilton County, Ohio**

Messrs. Simon L. Leis, Jr., Robert R. Hastings, Jr., and Merlyn Shiverdecker, 420 Hamilton County Court House, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Messrs. Jack C. Rubenstein, 609 Atlas Bank Building, Cincinnati, Ohio 45202, and Harry H. McIllwain, 805 Atlas Bank Building, Cincinnati, Ohio 45202, for Defendant-Appellant.

SHANNON, P. J.

This cause came on to be heard upon the appeal, the

transcript of the docket and journal entries and original papers from the Court of Common Pleas of Hamilton County, the transcript of the proceedings, the assignments of error, the briefs of counsel and amicus curiae and the arguments of counsel.

The defendant-appellant, Ricardo Woods, was convicted of the crime of aggravated murder and an appropriate specification set forth in the indictment by a three judge panel established after he had waived trial by jury. The same panel on a later date found that the defendant-appellant had failed to demonstrate any of the mitigating circumstances prescribed by Section 2929.04 (B), O.R.C. and accordingly sentenced him to death. One Roland Reaves was indicted jointly with the defendant-appellant, but was tried separately to a jury which found him to be guilty of aggravated murder and the pertinent specification. Subsequently, it was determined that Reaves had failed to establish mitigating circumstances and he, too, was sentenced to death.

This is an appeal timely taken from the judgment and sentences imposed upon the defendant-appellant, Ricardo Woods.

Conviction of the defendant-appellant was had on the second count of the indictment which alleged, inter alia:

> ". . . that Roland A. Reaves and Ricardo A. Woods on or about the seventeenth day of July in the year nineteen hundred and seventy four at the County of Hamilton and State of Ohio . . . purposely caused the death of David L. Cole while the said Roland A. Reaves and Ricardo A. Woods were fleeing immediately after attempting to commit Aggravated Robbery, in violation of Section 2903.01 Revised Code of Ohio."

Shortly after midnight on July 17, 1974, the Cincinnati Police received a telephone call from a citizen advising that

a man was on the roof of the United Dairy Farmers store at 2373 Florence Avenue, Cincinnati, Hamilton County, Ohio. The police then broadcast that information and officers responded. One of the officers, Patrolman Kramer, observed two men walking on Florence Avenue in the vicinity of the store looking over their shoulders, and he used his police radio to convey that information to fellow officers. Another officer, Patrolman David Cole, was also responding to the scene and approaching it on Florence Avenue.

Just after he made his broadcast, Officer Kramer heard a series of gunshots. Other police enroute to the store also heard the burst of gunfire and one of them, Patrolman Sizemore, saw Patrolman Cole's police car stopped near the curbing of the street. Sizemore stopped his vehicle, ran to Cole's aid and found Cole's body prone at the rear of the cruiser. Cole had been shot and Sizemore was unable to obtain any response to his efforts to get Cole to talk. Cole was transported to a hospital where he was pronounced dead on arrival. Ultimately, the cause of death was determined to have been internal hemorrage resulting from multiple gunshot wounds to Cole's head, chest and body.

Ronald Reaves was arrested on July 18, 1974, in Cincinnati and subsequently made a statement to investigating police which implicated Ricardo Woods. Woods was arrested on July 19, 1974, in West Virginia at the home of his mother.

After his arrest, Woods told police that he had been living with a sister of Roland Reaves for some time prior to the time of the homicide, and that Reaves had been staying with them for about two weeks. Woods stated that on July 16, 1974, he and Reaves agreed that they needed money and, using funds obtained by cashing a check for

unemployment compensation belonging to Woods, they bought a gun which Reaves told the seller he planned to use to rob a loan company. Just before midnight the same evening, Woods stated that he and Reaves parked Reaves' car close to the United Dairy Farmers store and began to "case" it; that they could see the store manager, who was adding up the day's receipts preparatory to making up a bank deposit, inside; that he (Woods) was armed with a .22 caliber pistol while Reaves had the .38 caliber handgun purchased earlier; that they planned to wait until the manager came out to take the money; and that he was watching the store from a bus stop across the street while Reaves was on the roof of the building.

Reaves came down from the roof and joined Woods, who said "things looked funny." Just at that moment, the fire department was making a run apparently nearby and sounding sirens. Woods and Reaves were walking away from the store and had reached a point about 800 feet distant when Patrolman Cole stopped his car. Woods stated that he leaned in the front window of the police cruiser to talk to Cole just as the officer was getting out on the opposite side of the car; that when Cole got to the rear of the cruiser Reaves began to fire at him, the first bullet striking Cole in the chest; that Reaves fired three or four times; that he (Woods) then shot at Cole who at that time was prone on the street, bleeding, and that as he and Reaves fled the scene, Cole fired three times at them. The post mortem examination of Cole's body disclosed that he had been struck by bullets from both guns.

In his statement, Woods detailed the path taken in their flight and described the clothing into which they changed. He told police that he left Cincinnati for West Virginia before noon on July 17, 1974, but that Reaves had decided to remain in the city.

Four errors have been assigned by appellant, two of which relate to the state of the evidence, while the remainder address themselves to constitutional issues. The first assignment of error, as phrased by appellant, is:

> "A defendant may not be convicted of aggravated murder when the state fails tc prove that the homicide occurred during the commission of an attempted aggravated robbery. Where the evidence is insufficient to prove an attempted aggravated robbery the charge must be reduced to murder."

These contentions were among those advanced by appellant in a motion for acquittal made below after the prosecution had rested its case in chief. That motion was partially successful in that the court granted it as it pertained to the first and third counts of the indictment. The court overruled the motion as it was addressed to the second count and second specification and it is to such rejection that the assignment refers in substance, though not in form.

Here, in presenting his argument supportive of the assignment, the appellant concedes that he and Reaves intended to commit a robbery at the United Dairy Farmers store, but asserts that the evidence adduced by the prosecution fails to establish any "overt act" committeed by either of them "directed toward the consummation of their criminal designs." Appellant submits that his viewing of the store premises from his vantage point across the street and Reaves' activities on the roof were "equivocal" acts "performed in the preparation of the crime" and therefore did not suffice as proof of an attempt to commit armed robbery.

Appellant makes no effort to temper the proof by the prosecution that David L. Cole was killed purposely, relying instead upon the contention that the homicide was

not committed while the murderers were in flight from an attempted armed robbery.

In enacting chapter 2911, O.R.C., (effective January 1, 1974), the Ohio legislature expanded the concept and coverage of antecedent robbery statutes. Consequently, section 2911.01, O.R.C., which defines aggravated robbery, provides in material part that:

> "(A) No person, in attempting or committing a theft offense as defined in section 2913.01 of the Revised Code, *or in fleeing immediately after such attempt* or offense, shall . . .
>
> (1) Have a deadly weapon . . . as defined in section 2923.11 of the Revised Code on or about his person or under his control;" (Emphasis ours).

Section 2913.01 (K) (1), O.R.C., declares aggravated robbery to be a theft offense, and both the .38 and the .22 caliber pistols carried by Reaves and Woods were deadly weapons by statutory definition, projectiles from which took the life of Officer Cole.

The sole question, then, is whether at the time of the homicide this appellant and his companion were fleeing from an attempted aggravated robbery.

As to the sufficiency of evidence with respect to the element of "fleeing," see our comments *infra* under the second assignment of error; as to whether the foregoing facts were sufficient to constitute an "atempted aggravated robbery," we note Section 2923.02 (A), O.R.C., which provides that:

> "No person, purposely or knowingly, . . . shall engage in conduct which, if successful, would . . . result in the offense."

After considering this statute in light of the totality of the evidence, we are convinced that the activities of the

appellant and his companion constituted an attempt to commit aggravated robbery.

Admittedly, Woods and Reaves planned to commit a robbery and bought a weapon specifically for use in such a crime. Together, they went to the United Dairy Farmers store and engaged in reconnaissance of the surrounding area. Each took a position which would enable him to carry out his plan to rob the manager as he left the store. They were armed and ready in all respects to complete their scheme. The final step, save for the intervening events, would have been for them to have shoved their guns into the belly of the manager in an effort to take from him the money they knew he would be carrying.

Must that final step have been taken before it could be said that Woods and Reaves were guilty of attempting to commit an aggravated robbery? We think not.

In reaching the conclusion that the prosecution had adduced evidence sufficient to establish an attempt to commit aggravated robbery, we are aided by the opinion in *State* v. *Farmer* (1951), 156 Ohio St. 214. There, Justice Taft restated an observation made in *Fox* v. *State* (1878), 34 Ohio St. 377, at page 379:

> "It is quite clear that in an 'attempt' to commit an offense an 'intent' to cimmit it must be present; and it is equally clear that the presence of intent alone is not sufficient. There must be some concomitant act or movement toward the execution of the purpose."

In adopting that pronouncement from *Fox*, supra, Justice Taft added at page 216 of his opinion in *Farmer*, supra, that:

> ". . . the act necessary in an attempt to commit a felony need not be the last proximate act prior to the consummation of the felony intended to be perpetrated."

Consequently, we hold that the evidence considered in its totality satisfies the test prescribed by Section 2923.02 (A), O.R.C., as well as the antecedent tests established by case law. Woods and Reaves clearly had engaged in a series of acts or movements toward the execution of their plan to rob and, as we comprehend the law to be, the prosecution was not required to prove the last proximate act prior to the commission of the robbery, i.e., that a gun had been shoved in the belly of the manager and a demand made for his money.

There being sufficient proof of an attempted aggravated robbery, the panel was not constrained to reduce the charge, but was entitled to and did consider properly the charge of aggravated murder.

The first assignment of error is not well taken.

The second assignment of error is, like the first, stated as a proposition of law. It is given to us that:

> "Where a defendant proves by clear and convincing evidence that he abandoned his effort to commit an offense under circumstances manifesting a complete and voluntary renunciation of his criminal purpose, the defendant may not be tried for aggravated murder for a homicide committed thereafter."

In support of this assignment which, essentially, echoes the first, appellant argues that it is clear from the evidence that he and Reaves had voluntarily abandoned their criminal intent to commit aggravated robbery prior to the killing of David L. Cole and accordingly that he was entitled to have the charge against him reduced to murder on the ground that at the time of the homicide he was not in flight from an attempted aggravated robbery.

Section 2923.02 (D), O.R.C., provides that:

> "It is an affirmative defense to a charge under [Section 2923.02, O.R.C.] that the actor abandoned his effort to commit the offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."

Again we must disagree with appellant in his assessment of the weight of the evidence in this case. We do not believe that the panel erred in finding, as it obviously did, that appellant had failed to establish the affirmative defense afforded him by the statute.

We have recounted above the salient evidence which in our opinion established that Woods and Reaves were attempting to commit the aggravated robbery which had been planned and prepared for. To that litany, we add now the fact that the conspirators left the scene on foot without making an effort to return to Reaves' car parked next to the store. That automobile was retrieved sometime during the afternoon of July 17, 1974, by the man who had sold the .38 caliber pistol to Reaves, and then was returned to Reaves.

The statute requires expressly that the renunciation of the criminal purpose be voluntary. After review of all the evidence, we can not say that the finding by the triers of the facts, that the appellant had failed to establish that the abandonment of his criminal purpose and plan was voluntary, was contrary to the manifest weight of the evidence. We reiterate that we are convinced that the robbery was frustrated by a turn of events — that the conspirators did not abandon their criminal scheme because of remorse, a change of heart, repentence or otherwise voluntarily, but fled the scene because of alarm and fright. The attempt failed to ripen into an accom-

plishment only because of the intervening circumstances and the plan was not aborted by a decision reached independently of those factors. That being so, it follows that the rejection of the defense proffered was not contrary to law.

The second assignment of error is not well taken for the reasons set forth immediately above coupled with those given in our resolution of the first assignment of error.

The third and fourth assignments of error raise constitutional questions which we have considered and ruled upon in *State* v. *Reaves,* Hamilton County, Number C-75022 (1st Dist. Ct. of App., January 26, 1976), unreported.

These assignments of error are:

THIRD ASSIGNMENT OF ERROR

The provisions of Sections 2903.01, 2929.03 and 2929.-04, unconstitutionally permit arbitrary imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the Federal Constitution. Where an aggravated murder defendant is sentenced to death under Section 2903.03 (B) after a finding of guilt on the specification in Section 2929.04 (A) (7), that defendant has been convicted and sentenced under arbitrary and vague provisions of the new criminal code which do not differ in any constitutionally significant respect from the arbitrary selection process held violate of the Federal Constitution by *Furman* v. *Georgia.*

FOURTH ASSIGNMENT OF ERROR

The death penalty imposed by Section 2929.04, Revised Code, constitutes cruel and unusual punishment prohibited by the Eeighth Amendment and Article I, Section 9 of the Ohio Constitution.

We stated in *Reaves,* supra, that:

> "We find nothing upon the face of Revised Code Sections 2903.01, 2929.02, 2929.03 and 2929.04 to render those enactments unconstitutional; nor does either logic or experience require us to conclude that those sections have been or will be unconstitutionally applied. They appear to us to be appropriate legislative responses to the stimulus of *Furman,* supra, in that juries and judges are now provided with narrow definitions of crimes for which the death penalty is to be imposed and are given standards to follow in determining the sentence in capital cases."

In *Reaves,* supra, we disposed of an assertion that the death penalty imposed by Section 2929.04, O.R.C., constitutes cruel and unusual punishment prohibited by the Eighth Amendment of the Federal Constitution and Article I, Section 9 of the Ohio Constitution, by extracting from the opinion of the Chief Justice in *Furman,* supra, at p. 2799, this language:

> "In the 181 years since the enactment of the Eighth Amendment, not a single decision of this Court has cast the slightest shadow of a doubt on the constitutionality of capital punishment. In rejecting Eighth Amendment attacks on particular modes of execution, the Court has more than once implicitly denied that capital punishment is impermissibly 'cruel' in the constitutional sense."

Hence, we find the third and fourth assignments of error to be not well taken on the authority of *Reaves,* supra.

The judgment of the Court of Common Pleas of Hamilton County is affirmed.

PALMER and KEEFE, J. J., CONCUR.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-75022

STATE OF OHIO,

Plaintiff-Appellee,

vs.

ROLAND REAVES,

Defendant-Appellant.

OPINION

(Filed January 26, 1976)

Appeal From The Court of Common Pleas
Hamilton County, Ohio

Messrs. Simon L. Leis, Jr., Fred J. Cartolano and Robert R. Hastings, Jr., 420 Hamilton County Court House, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Messrs. Bernard J. Gilday and D. Shannon Smith, 1500 American Building, Cincinnati, Ohio 45202, for Defendant-Appellant.

SHANNON, P. J.

This cause came on to be heard upon the appeal, the transcript of the docket and journal entries, the original papers and pleadings from the Court of Common Pleas of Hamilton County, the transcript of the proceedings, the assignments of error, the briefs of the parties and amicus curiae and arguments of counsel.

During the very early hours of the morning of July 17, 1974, a Cincinnati police officer, while in uniform and in performance of his duties, was shot to death. The following day, the appellant was arrested and subsequently indicted with one Ricardo Woods for the crime of aggravated murder.

Appellant's trial to a jury commenced October 15, 1974, and over objection by the defense the court permitted examination of prospective jurors upon voir dire concerning their attitudes toward capital punishment. Three challenges for cause by the prosecution based upon opposition to capital punishment expressed during such questioning were sustained.

Ultimately, the jury returned a verdict of guilty as charged in the second count of the indictment and a verdict determining appellant's guilt of the necessary specification set forth in the indictment pertaining to the second count.

The court then proceeded according to law and on January 13, 1975, after a finding of the absence of any of the mitigating factors under Section 2929.04 (B) O.R.C., the appellant was sentenced to death.

This timely appeal was taken from the judgment of guilt and the sentence of death.

I.

The first assignment of error is:

> "The Trial Court substantially erred to the prejudice of Appellant in denying Appellant's Motion to Dismiss for the reason that the provisions of Sections 2903.01, 2929.02, 2929.03 and 2929.04 of the Ohio Re-

vised Code unconstitutionally permit arbitrary imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the Federal Constitution."

Furman v. *Georgia*, 92 S. Ct. 2726 (1972), 408 U.S. 238 (1972), is the predicate for appellant's contention that the Ohio statutes fail to satisfy the "constitutional requirements laid down" by the United States Supreme Court and accordingly constitute a statutory scheme which permits arbitrary, rare and discriminatory use of the death penalty.

Directly, *Furman* struck down the Georgia death penalty statute. One of the effects of the decision was to demand a measure of change from legislative bodies throughout the Union in the manner in which the penalty is to be imposed.

We think it would serve no useful purpose to iterate the rationale in the respective opinions in *Furman*. But, as a beginning to our disposition of the vexing questions posed by the initial assignment of error, we must refer to some salients in the melange which makes up the body of that case.

Only two members of the Court, Justices Brennan and Marshall, concluded that the Eight Amendment prohibits capital punishment for all crimes and under all circumstances. We take it as given, then, that "the constitutional prohibition against 'cruel and unusual punishments' cannot be construed to bar the punishment of death." See, opinion, Mr. Chief Justice Burger, *Furman* v. *Georgia*, 92 S. Ct. 2726 (1972) at pp. 2796-97. Since capital punishment is not per se violative of the Eighth Amendment, the inquiry turns to the question what statutory schemes will pass constitutional muster if a state wishes to maintain the availability of capital punishment.

The opinions of Justices Stewart and White, essential to support the plurality judgment setting aside the sentences considered by the Court, turned on the assumption that the punishment of death was being meted out randomly. They concluded that the sentences had to be set aside, not because the death penalty was impermissibly cruel, but because juries and judges had failed to exercise their sentencing discretion in acceptable fashion. Mr. Justice Stewart stated that the penalty was being "wantonly" and "freakishly" imposed while Mr. Justice White stressed the "infrequency" of its imposition.

Responding to what appears to be the mandate in *Furman* and to the suggestion of the Chief Justice that state legislatures could enact statutes meeting constitutional requirements by providing judges and juries with definite standards for the imposition of the penalty or by defining in narrower and more specific terms those crimes warranting capital punishment, the Ohio Legislature enacted Sections 2903.01, 2929.03 and 2929.04, Ohio Revised Code.

We have examined these laws and conclude that there is nothing there which would permit us to find them facially unconstitutional, i.e., the Ohio statutory scheme would appear to exclude the elements of wanton, freakish, or arbitrary application of the penalty which proved fatal to the Georgia statute.

To the best of our knowledge but one court of review in Ohio had addressed itself to the issue before us here. In *State* v. *Bayless*, Ninth District Court of Appeals of Ohio, case number 74-3-244, decided February 5, 1975, (unreported), we find:

> ".. . the statutes of Ohio permitting the impositions of the death penalty do not permit an arbitrary imposition of the death penalty and are not constitutionally impermissible under the Constitution of the

United States or the Constitution of the State of Ohio."

The Chief Justice stated in his opinion in *Furman,* supra, that:

"There are no obvious indications that capital punishment offends the conscience of society to such a degree that our traditional deference to the legislative judgment must be abandoned.

In context, he observed,

". . . reported results [of public opinion polls] have shown nothing approximating the universal condemnation of capital punishment that might lead us to suspect that the legislatures in general have lost touch with current social values." See, *Furman* v. *Georgia,* 92 S. Ct. 2726 (1972), pp. 2801-02, Part III, Opinion of the Chief Justice.

In *Furman,* the petitioners argued that the general revulsion toward the death penalty which they submitted would lead to its repeal if it was commonly and widely enforced is demonstrated by the disparity of the number of cases in which capital punishment had been imposed and the number of cases in which it had been available.

Apparently, it was the body of empirical evidence presented by petitioners in support of such argument that persuaded Justices Stewart and White to conclude that infliction of a sentence of death offends the Eighth and Fourteenth Amendment.

However, we have had no similar data spread before us. It cannot be argued persuasively that judges and juries have randomly, capriciously or arbitrarily imposed the death penalty under the new code because there is almost no table of experience in its use.

Simply put, it has not been demonstrated (we think the paucity of examples of use of the penalty under the new code makes it impossible of demonstration) that judges and juries have abused the severely reduced and restricted discretion afforded them currently.

To sum up, we find nothing upon the face of Revised Code Section 2903.01, 2929.02, 2929.03 and 2929.04 to render those enactments unconstitutional; nor does either logic or experience require us to conclude that those sections have been or will be unconstitutionally applied. They appear to us to be appropriate legislative responses to the stimulus in *Furman,* supra, in that juries and judges are now provided with narrower definitions of crimes for which the death penalty is to be imposed and are given standards to follow in determining the sentence in capital cases. Thus, we find ourselves in accord with *Bayless,* supra. The first assignment of error accordingly is not well taken.

II.

The second assignment of error is:

"The Trial Court substantially erred to the prejudice of Appellant in denying Appellant's Motion to Dismiss for the reason that the death penalty imposed by Section 2929.04 of the Ohio Revised Code constitutes cruel and unusual punishment prohibited by the Eighth Amendment of the Federal Constitution and Article I, Section 9 of the Ohio Constitution."

This assignment is subsumed actually in the first assignment of error. Therefore, we have little to add to what has already been stated.

However, in *Furman,* supra, the Chief Justice flatly declared:

"In the 181 years since the enactment of the Eighth

> Amendment, not a single decision of this Court has cast the slightest shadow of a doubt on the constitutionality of capital punishment. In rejecting Eighth Amendment attacks on particular modes of execution, the Court has more than once implicitly denied that capital punishment is impermissibly 'cruel' in the constitutional sense." See *Furman* v. *Georgia*, 92 S. Ct. 2726 (1972), Opinion of the Chief Justice, p. 2799.

As we have stated, the effect of *Furman* was to hand back the problem of infliction of capital punishment to the appropriate legislative bodies and to demand of them an unspecified measure of change in its administration.

In commenting upon that remand, the Chief Justice said in Part VI of his opinion from which we have quoted earlier:

> "The legislatures are free to eliminate capital punishment for specific crimes or to carve out limited exceptions to general abolition of the penalty, *without adherence to the conceptual strictures of the Eighth Amendment.*" (emphasis ours).

Because of the force of that directive and essentially for the reasons set forth in our disposition of the initial assignment of error, the second assignment is not well taken.

III.

The third assignment of error is:

> "The Court substantially erred to the prejudice of Appellant in permitting the prosecution, during voir dire examination, to question prospective jurors concerning their feelings and opinions on Capital Punishment, and when it sustained the prosecution's challenges for cause of prospective jurors based on their answers to such inquiries."

Appellant urges that Crim. R. 24(B) has superseded Section 2945.25, O.R.C., and the rule read in conjunction with the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution, precludes any inquiry of a prospective juror touching upon his opinions which might preclude him from finding an accused guilty of an offense punishable by death.

We cannot agree that Section 2945.25, O.R.C., has been superseded or negated by the criminal rule. Indeed, we are convinced that Section 2945.25 is a substantive statutory provision and accordingly any rule of procedure in conflict therewith would be invalid. See, *State* v. *Hughes* (1975), 41 Ohio St. 2d 208, *State* v. *Waller*, Court of Appeals for Hamilton County, number C-74666, decided November 24, 1975 (unreported), and *State* v. *Leary*, Court of Appeals for Hancock County, number 5-75-19, decided November 12, 1975 (unreported).

Section 2945.25 provides, in pertinent part:

> "A person called as a juror on an indictment may be challenged for the following causes:
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> • • •
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> (c) In the trial of a capital offense, that his opinions preclude him from finding the accused guilty of an offense punishable with death;"

Therefore, the court below did not err in permitting the prosecution to examine prospective jurors upon voir dire concerning their attitudes toward capital punishment because a juror maintaining an opinion precluding him from finding an accused guilty of an offense punishable by death, as was the defendant-appellant here, may be challenged for cause by law.

The third assignment of error, then, is not well taken.

The judgment of the Court of Common Pleas of Hamilton County, Ohio, is affirmed.

PALMER and KEEFE, J. J., CONCUR.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

APPENDIX E

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. B742064

THE STATE OF OHIO

vs.

ROLAND A. REAVES

JURY VERDICT
(Entered October 24, 1974)

We, the Jury, in the issue joined, find the defendant, ROLAND A. REAVES guilty of AGGRAVATED MURDER, after attempting to commit AGGRAVATED ROBBERY, sec. 2903.01 R.C. as charged in the SECOND COUNT of the Indictment.

[Signed by all twelve (12) jurors]

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. B742064

THE STATE OF OHIO

vs.

ROLAND A. REAVES

JURY VERDICT

(Entered October 24, 1974)

We, the Jury, in the issue joined, find the defendant, ROLAND A. REAVES guilty of AGGRAVATED MURDER, sec. 2903.01 R.C. IN SPECIFICATION TO THE SECOND COUNT, of the Indictment.

[Signed by all twelve (12) jurors]

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

NO. B-742064

STATE OF OHIO,

Plaintiff,

v.

ROLAND REAVES,

Defendant.

ENTRY FINDING AN ABSENCE OF MITIGATING CIRCUMSTANCES PURSUANT TO A HEARING UNDER SECTION 2929.03 AND 2929.04 OF THE OHIO REVISED CODE

(Entered January 15, 1975)

This matter came before the Court on January 13, 1975, for a hearing on mitigating circumstances prior to sentencing for a capital offense, pursuant to Sections 2929.03 and 2929.04 of the Ohio Revised Code. The Court at that time was in possession of reports of a pre-sentence investigation and psychiatric examinations, as required by Section 2929.03 of the Revised Code. At the said hearing, the defendant, Roland Reaves, was given the opportunity to present testimony or to make a statement and, through his attorneys, to argue the question of mitigating circumstances, all of which the defendant declined to do.

The Court, therefore, finds that none of the mitigating

circumstances set forth in Section 2929.04 of the Revised Code, to-wit:

1) that the victim of the offense induced or facilitated it;

2) that it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation; or

3) that the offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity;

has been shown to exist by a preponderance of the evidence as required by law, and that the Court, therefore, is required by law under Section 2929.03 (E) to sentence the defendant, Roland Reaves, to death in the electric chair.

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS
CRIMINAL DIVISION

NO. B742064

THE STATE OF OHIO

vs.

ROLAND A. REAVES

INDICTMENT FOR: AGGRAVATED MURDER
2903.01 R.C.

(Entered January 13, 1975)

The Defendant was present in open Court with his Counsel, Bernard J. Gilday, Jr., and Thomas Stueve, on the 13th. day of January, 1975.

The Court informed the Defendant that as he well knew, after trial by a Jury the Defendant had been found Guilty, of the offense of Aggravated Murder, 2903.01 R.C. in specification to the 2nd count of the Indictment.

The Court afforded Defendant's Counsel an opportunity to speak on behalf of the Defendant. The Court addressed the Defendant, Roland A. Reaves, personally and asked him if he wished to make a statement in his own behalf or present any information in mitigation of punishment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court, that the Defendant, Roland A. Reaves, on the charge of Aggravated Murder, 2903.01 R.C.

in specification to the 2nd. Count of the Indictment, be taken to the Jail of Hamilton County, at Cincinnati, Ohio, and within the next Thirty (30) Days, be delivered by the Sheriff of Hamilton County, Ohio, to the Warden of the Ohio State Penitentiary, and that on the 15th. day of May, 1975, the said Warden shall cause a current of electricity of sufficient intensity to cause Death, to pass through the Body of Roland A. Reaves, the application of such current to be continued until the said Roland A. Reaves is DEAD.

The Defendant was notified of his right to appeal as required by Crim. R. 32 (A) (2).

/s/ FRANK M. GUSWEILER
Judge

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS
CRIMINAL DIVISION

NO. B-742064

THE STATE OF OHIO

vs.

RICARDO L. WOODS

INDICTMENT FOR: AGGRAVATED MURDER
SEC. 2903.01 R.C.

(Entered October 23, 1974)

COURT FINDING

This cause came on this day to be heard, the Defendant Ricardo L. Woods, having Waived a Trial by Jury, in writing and was submitted to the panel of Three (3) judges.

And, the Court, having heard the evidence and the arguments of counsel, unanimously find that the Defendant, Ricardo L. Woods, is guilty of Aggravated Murder as he stands charged in the Second Count of the indictment and guilty of the specification to the second count of the indictment.

/s/ WILLIAM R. MATTHEWS
Judge

/s/ WILLIAM S. MATHEWS
Judge

/s/ ROBERT L. BLACK, JR.
Judge

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

NO. B-742064

STATE OF OHIO

Plaintiff

v.

RICARDO L. WOODS

Defendant

INDICTMENT FOR: AGGRAVATED MURDER 2903.01 R. C.

(Entered January 16, 1975)

The defendant, Ricardo L. Woods, was present in open court with his counsel, Jack Rubenstein and Harry H. McIlwain, on the sixteenth day of January, 1975, having been previously found guilty of the offense of Aggravated Murder, 2903.01 R. C., and the specifications to the second count of the indictment.

Pursuant to Sections 2929.03 and 2929.04 of the Ohio Revised Code, a hearing on mitigating circumstances prior to sentencing for a capital offense was held.

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant, and to present any testimony and other evidence relevant to the penalty which should be imposed.

Upon consideration of the reports, testimony, other evi-

dence, statement of the offender, and arguments of counsel submitted to the Court, pursuant to division (D) of Section 2929.03 of the Ohio Revised Code, this panel of three Judges unanimously find that none of the mitigating circumstances listed in division (B) of Section 2929.04 have been established by a preponderance of the evidence.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court that the defendant, Ricardo L. Woods, on the charge of Aggravated Murder, 2903.01 R. C. in specification to the second count of the Indictment, be taken to the Jail of Hamilton County, at Cincinnati, Ohio, and within the next thirty (30) days be delivered by the Sheriff of Hamilton County, Ohio, to the Warden of the Ohio State Penitentiary, and that on the nineteenth day of May, 1975, the said Warden shall cause a current of electricity of sufficient intensity to cause death, to pass through the body of Ricardo L. Woods, the application of such current to be continued until the said Ricardo L. Woods is DEAD.

The defendant was notified of his right to appeal as required by Crim. R. 32 (A) (2).

/s/ WILLIAM R. MATTHEWS
Judge

/s/ WILLIAM S. MATHEWS
Judge

/s/ ROBERT L. BLACK, JR.
Judge

APPENDIX F

THE STATE OF OHIO, HAMILTON COUNTY

The Court of Common Pleas of Hamilton County:
Term of July in the year nineteen hundred and seventy-four

HAMILTON COUNTY, ss.

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SECOND COUNT

AND THE GRAND JURORS AFORESAID UPON THEIR OATHS AFORESAID DO FURTHER PRESENT THAT ROLAND A. REAVES AND RICARDO A. WOODS ON OR ABOUT THE SEVENTEENTH DAY OF JULY IN THE YEAR NINETEEN HUNDRED AND SEVENTY FOUR AT THE COUNTY OF HAMILTON AND STATE OF OHIO, AFORESAID, PURPOSELY CAUSED THE DEATH OF DAVID L. COLE WHILE THE SAID ROLAND A. REAVES AND RICARDO A. WOODS WERE FLEEING IMMEDIATELY AFTER ATTEMPTING TO COMMIT AGGRAVATED ROBBERY, IN VIOLATION OF SECTION 2903.01 REVISED CODE OF OHIO.

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SPECIFICATION TO THE SECOND COUNT

THE GRAND JURORS FURTHER FIND AND SPECIFY THAT AT THE TIME OF THE OFFENSE PRESENTED ABOVE, THE VICTIM, THE SAID DAVID L. COLE, WAS A LAW ENFORCEMENT OFFICER WHOM THE SAID ROLAND A. REAVES AND RI-

CARDO A. WOODS KNEW TO BE SUCH, AND WHO AT THE TIME WAS ENGAGED IN HIS DUTIES.

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/s/ SIMON L. LEIS, JR.
Prosecuting Attorney
Hamilton County, Ohio

/s/ FRED J. CARTOLANO
Assistant Prosecuting Attorney

APPENDIX G

OHIO REVISED CODE

2929.03 Imposing sentence for a capital offense

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such

section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

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2929.04 Criteria for imposing death or imprisonment for a capital offense

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.-01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

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CONSTITUTION OF THE UNITED STATES

AMENDMENT VIII – EXCESSIVE BAIL, FINES, PUNISHMENTS

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.